No. 02-20-00403-CV

In the Court of Appeals for the Second Appellate District at Fort Worth, Texas

CARROLL INDEPENDENT SCHOOL DISTRICT BOARD OF TRUSTEES; MICHELLE MOORE, IN HER CAPACITY AS TRUSTEE AND PRESIDENT OF THE CARROLL INDEPENDENT SCHOOL DISTRICT BOARD OF TRUSTEES; SHERI MILLS, IN HER CAPACITY AS TRUSTEE OF THE CARROLL INDEPENDENT SCHOOL DISTRICT; DANNY GILPIN, IN HIS CAPACITY AS TRUSTEE OF THE CARROLL INDEPENDENT SCHOOL DISTRICT; TODD CARLTON, IN HIS CAPACITY AS TRUSTEE OF THE CARROLL INDEPENDENT SCHOOL DISTRICT; AND DAVID ALMAND, IN HIS CAPACITY AS TRUSTEE OF THE CARROLL INDEPENDENT SCHOOL DISTRICT,

Defendants-Appellants,

v.

KRISTIN GARCIA,

Plaintiff-Appellee.

On Appeal from the 153rd Judicial District Court, Tarrant County
Case No. 153-319405-20
Oral Argument Requested

BRIEF OF APPELLEE KRISTIN GARCIA

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Statement Of The Case

On September 3, 2020, plaintiff Kristin Garcia sued the Carroll Independent School District Board of Trustees, along with five of the trustees in their official capacities. CR 5. The defendants filed a plea to the jurisdiction, which the district court denied. CR 301–302. On December 3, 2020, after the district court denied the defendants' plea to the jurisdiction, Ms. Garcia filed an amended petition that adds new claims and provides a more detailed demand for relief. CR 625–650. On December 8, 2020, five days *after* the plaintiff filed her first amended petition, the defendants appealed the district court's order denying their plea to the jurisdiction regarding the plaintiff's original petition. CR 662.

Statement Regarding Oral Argument

Ms. Garcia agrees with the appellants that the issues presented in this case are sufficiently important to warrant oral argument.

Issues Presented

1. Is the defendants' plea to the jurisdiction moot on account of the first amended petition that Ms. Garcia filed on December 3, 2020—five days before the defendants' filed their notice of appeal in this case?

2. Is Ms. Garcia's lawsuit barred by governmental immunity?

3. Is Ms. Garcia's lawsuit moot?

Statement Of Facts

In October of 2018, a video appeared on Facebook that showed Carroll ISD students reciting a chant that included a racial epithet. The incident occurred at a private residence off school property and was unconnected to any school-sponsored activity. But the video circulated widely on social media and received widespread publicity. In response to this episode, the Carroll Independent School District commissioned a "district diversity council" consisting of 63 parents, students, and staff. The council eventually drafted a 34-page "Cultural Competence Action Plan"[1] for the school district to consider. CR 38–71.

The proposed Cultural Competence Action Plan has provoked a firestorm of controversy among parents and members of the community. The plan goes far beyond the prevention of offensive racial epithets by reaching anything that might be viewed as a "microaggression," which the plan defines as "everyday verbal or nonverbal, snubs or insults, whether intentional or unintentional, which communicate hostile, derogatory, or negative messages to target persons based solely upon their marginalized or underrepresented group membership." CR 38. The Plan also extends its prohibitions on "microaggressions" and "discriminatory behaviors" beyond racially offensive speech to encompass "any harassing, offensive, hateful or discriminatory

1. For simplicity and ease of exposition, we will occasionally refer to the proposed "Cultural Competence Action Plan" as "the Plan" throughout this brief.

speech directed at individuals or groups of individuals based on race, religion, color, national origin, gender, sexual orientation or disability." CR 38. The inclusion of "sexual orientation" threatens the free-speech rights and religious freedom of Christian students and others who disapprove of homosexual behavior, and it threatens every student with discipline if they evince anything less than total and unconditional approval of homosexual conduct and same-sex marriage. The plan is also unclear on whether "sexual orientation" is limited to homosexual or bisexual orientations, or whether it extends beyond those categories to other forms of sexual attraction that (at least for now) can still be criticized and condemned in polite society. Finally, many have questioned whether school officials should even be responding to student behavior that occurs away from school property and off school time, regardless of how boorish and offensive that student behavior may be.

On August 3, 2020, the board of trustees approved a motion by Sheri Mills to "receive" the Cultural Competence Action Plan and "direct" the administration to hold workshops on that plan. The precise wording of that motion can be found in the minutes of the board meeting:

> Motion was made by Sheri Mills and seconded by Danny Gilpin to receive the plan and direct the administration to hold a series of workshops for clarity on the Cultural Competence Action Plan (CCAP).

CR 79. Ms. Mills also read her motion aloud at the meeting of August 3, 2020, shortly before it was approved, and she said:

> I move that the school board of trustees receive the plan and direct the administration to hold a series of workshops for clarity on the Cultural Competence Action Plan.

https://carrollisdtx.swagit.com/play/08032020-1522 (Item 5, at 1:32:52). The motion was approved on a 5-2 vote.

On September 3, 2020, plaintiff Kristin Garcia sued the Carroll Independent School District Board of Trustees, along with the five trustees that voted to "receive" the Cultural Competence Action Plan and "direct" the administration to hold workshops on that plan. CR 5. Ms. Garcia alleged that the defendants violated the Texas Open Meetings Act in taking these actions because: (1) The five trustees who voted in favor of the motion deliberated in secret and agreed over text message to receive the plan before the public meeting of August 3, 2020;[2] and (2) The defendants' public notice for the meeting of August 3, 2020, stated only that the Cultural Competence Action Plan would be "presented," which failed to sufficiently notify the public that the board would consider taking action by formally receiving the Plan and directing the administration to hold workshops regarding it.[3] Ms. Garcia sought mandamus to "reverse" the school board's decisions to "receive" the Cultural Competence Action Plan and "direct" the administration to hold workshops on that plan. *See* Tex. Gov't Code § 551.142(a) ("An interested person, including a member of the news media, may bring an action by mandamus or

2. This is Count 1 in the petition. CR 22–23.
3. This is Count 2 in the petition. CR 23–24.

injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body."). Ms. Garcia also requested:

> a. A declaration voiding all actions taken in violation of the Open Meetings Act;
>
> b. Plaintiff's costs of litigation and reasonable attorney's fees incurred in bringing this suit pursuant to Tex. Gov't Code § 551.142;
>
> c. A return of all funds expended in any meeting that occurred in violation of the Texas Open Meetings Act;
>
> d. Injunctive relief to stop Ms. Moore and her trusted Board members from engaging in any further violations of the Texas Open Meetings Act, including Court oversight of all future electronic communications between Ms. Moore, Ms. Mills, Mr. Gilpin, Mr. Almand, and/or Mr. Carlton concerning Board business, relating or pertaining (either directly or indirectly) to the Plan; and
>
> e. All other relief to which Plaintiff may appear entitled.

CR 27.

On September 14, 2020—11 days after Ms. Garcia filed her lawsuit—the board of trustees voted to rescind the *motion* that was made at the meeting of August 3, 2020. But this vote did not in any way undo the board's decisions to "receive" the Plan and "direct" the administration to hold workshops on the Plan. The transcript from the school board's meeting of September 14, 2020, makes this clear:

Ms. Moore: Next on the agenda is [to] consider and take possible action regarding the August 3, 2020, board action regarding the District Diversity Council and the CISD Cultural Competence Action Plan.

Mr. Gilpin: So I'd like to make a motion, if I may. I move to rescind the motion that was made at the meeting on August 3, 2020, regarding the CCAP.

Unknown Board Member: And I'd like to ask a question: What does "rescind" mean and how does that affect our receiving it?

Ms. Moore: So we have our attorney here. If you could address that for the board, that would be great.

Carroll ISD Board Attorney: Yes ma'am. Madam Chair and members of the board, "rescind" just means simply to go back and correct what is claimed to be a procedural error, it's a perceived procedural error, this will clear that up. ***It will not affect the fact that the board has accepted the report and recommended it for consideration by the superintendent and further committee study.*** Thank you. Do you have any other questions?

Ms. Moore: So you used the word "accept" and I just want to make sure we use the word receive and they may be interchangeable, but I know these words can be very tricky.

Carroll ISD Board Attorney: If I said "accept," I apologize. . . . [T]o receive just means that the board has heard the report and has received it and that literally it's like me handing you a piece of paper and you've received it.

Ms. Moore: Right.

Carroll ISD Board Attorney: ***So that's the action that you've taken. And this does not affect that.***

Ms. Moore: ***And is there any impact to the rest of the motion in terms of the board workshops or community events that we had wanted to do?***

Carroll ISD Board Attorney: ***No impact on that at all.***

Unknown Board Member: So this is purely clearing up a perceived procedural issue.

Carroll ISD Board Attorney: Correct. It's purely clearing up that perceived procedural issue.

Unknown Board Member: ***So the fact that we received, we heard the report.***

Carroll ISD Board Attorney: Yes.

Unknown Board Member: ***And we had instructed the superintendent and his employees to set up additional community input, receive additional input on the plan.***

Carroll ISD Board Attorney: ***And that can go forward as is, yes. Does not affect that at all.*** It's just to clear up that perceived procedural error.

Ms. Moore: So I need a second.

Mr. Lannen: I'll second.

Ms. Moore: Hearing a motion and a second, are there any additional questions or comments? Hearing none, all those in favor? Six. All those opposed? Motion passes, six to one.

https://carrollisdtx.swagit.com/play/09142020-814 (Items 4&5, at 9:20) (emphasis added).

So the Board's actions in "receiving" the Cultural Competence Action Plan—and in "directing" the administration to hold workshops on the Cultural Competence Action Plan—have *not* been reversed. The Plan has still been "received" by the school board, and the administration remains under a directive to hold workshops on the Plan. The school board voted to rescind the motion *not* because it was seeking to undo those disputed actions, but because it no longer believes that it was necessary to hold a formal vote on those decisions. The defendants acknowledged this in their district-court briefing. CR 227 ("Plaintiff cites to no authority, and there is none, that would have required procedural action for the Board to receive the information or for the administration to continue to work on the CCAP; however, the Board mistakenly took action to receive the plan and encourage [the] administration to continue its work."); CR 228 ("[T]he Board did not have to take any action at the August 3, 2020 Board meeting in order to receive the report and allow administration to continue developing the CCAP").

On September 28, 2020, the defendants filed a plea to the jurisdiction arguing that Ms. Garcia's lawsuit was moot. CR 212–223. On October 8, 2020, the defendants filed a first amended plea to the jurisdiction that reiterated their mootness arguments. CR 224–236. Neither of those pleas raised a governmental-immunity defense. The defendants also filed a petition for interpleader in an effort to "moot" Ms. Garcia's demand for costs and attorneys' fees. CR 245–249. The petition for interpleader asserted that: (1) "Garcia's

attorneys have shared their attorneys' fees as of September 22, 2020, which totaled $10,700." CR 247; and (2) The defendants "will pay or cause to be paid reasonable attorneys' fees" in that amount, and the defendants are "ready, able, and willing to pay this sum to Garcia and/or her attorneys who are lawfully entitled to receive it as relief." CR 248.

After a hearing, the district court denied the plea to the jurisdiction and entered the following order:

> After careful consideration of the pleadings, the evidence, and the applicable law, the Court finds that Plaintiff's claims under the Texas Open Meetings Act are not moot, and the Defendants' First Amended Plea to the Jurisdiction is without merit. Accordingly, the Court hereby DENIES Defendants' First Amended Plea to the Jurisdiction.

CR 301–302.

On December 3, 2020, Ms. Garcia filed an amended petition. CR 625–650. This amended petition was filed *after* the district court had denied the defendants' plea to the jurisdiction, but *before* the defendants had filed their notice of appeal from that ruling.

The amended petition adds a new claim, which alleges that the defendants violated the Texas Open Meeting Act by failing to provide adequate notice before their meeting of September 14, 2020—the meeting at which they voted to *rescind* the motion that they approved at the meeting of August 3, 2020. The amended petition claims that the notice for this meeting was in-

adequate in two ways. First, the amended petition faults the description of Item 4.C.1 of the Executive Session, which said:

> The Board will consult with its attorneys regarding pending litigation and the matter styled Cause No. 236-319405-20, Garcia v. Carroll ISD Board of Trustees, et al.

CR 598, 645–646. The amended petition alleges that this statement failed to comply with the Texas Open Meetings Act because it "failed to identify with sufficient specificity the topic under consideration." CR 646. Second, the amended petition faults the description of Item 5.B, which said:

> Consider and Take Possible Action Regarding the August 3, 2020 Board Action Regarding District Diversity Council / CISD Cultural Competence Action Plan

CR 598, 646. The amended petition asserts that this description failed to alert the public that the Board might *rescind the motion* made at the meeting of August 3, 2020. CR 646 ("[T]he Board's cryptic description lacked sufficient specificity when compared with the Board's ultimate action taken at the meeting."). The amended petition therefore asked the Court to "reverse" the actions taken to *rescind* the disputed motion, in addition to the relief that Ms. Garcia requested in her original petition. *See* Tex. Gov't Code § 551.142(a) ("An interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmen-

tal body."). The amended petition also provided a more detailed demand for relief than what appeared in Ms. Garcia's original petition:

> A. The Court should declare as void all actions taken in violation of the Open Meetings Act.
>
> B. The Court should award Plaintiff's costs of litigation and reasonable attorney's fees incurred in bringing this suit pursuant to Texas Government Code § 551.142.
>
> C. The Court should require Defendants to return all funds expended as a result of any violation of the Texas Open Meetings Act as alleged herein and allowed by law.
>
> D. The Court should impose all temporary and permanent injunctive relief permitted by the Texas Open Meetings Act to reverse (or undo), stop, and/or prevent any actions taken and being taken to implement the actions taken by the Board in violation of the Texas Open Meetings Act. As set forth in her Motion for Temporary Restraining Order, Ms. Garcia will suffer irreparable injury that cannot be compensated in damages, or any damage suffered by her cannot be measured by any pecuniary standard. Thus, Ms. Garcia requests the Court to impose a temporary injunction that, *inter alia*, enjoins Defendant Carroll Independent School District Board of Trustees, including any of its committees (including the District Diversity Council), from taking any further action to advance and/or implement the Plan. The Court should also order all electronic communications between Ms. Moore, Ms. Mills, Mr. Gilpin, Mr. Almand, and/or Mr. Carlton concerning Board business, relating or pertaining (either directly or indirectly) to the Plan to be overseen by the Court and/or Ms. Garcia during the pendency of this case.

E. The Court should order all other relief to which Ms. Garcia may appear entitled.

CR 647–648.

On December 8, 2020, five days *after* Ms. Garcia filed her first amended petition, the defendants appealed the district-court order denying their plea to the jurisdiction regarding the *original* petition. CR 662. That appeal is now before this Court.

Summary Of Argument

Before the defendants filed their notice of appeal, Ms. Garcia filed an amended petition alleging that the defendants had violated the Texas Open Meetings Act at their meeting of September 14, 2020—and that seeks to "reverse" the actions that the defendants took at that meeting to "rescind" their motion from August 3, 2020. The amended petition moots the defendants' plea to the jurisdiction, which assumes the validity of the defendants' efforts to "rescind" their earlier motion, and it removes any possible basis for a jurisdictional dismissal in this case. The defendants do not even acknowledge the amended petition, and they act as though the *original* petition remains the relevant pleading. The Court can make short work of this appeal by declaring the plea to the jurisdiction moot and affirming the district court's ruling on that basis.

If the Court chooses to reach the defendants' arguments, it should reject their arguments for a governmental-immunity dismissal on numerous grounds. First, none of the *individual* trustees can assert governmental im-

munity because they have been sued for an *ultra vires* act. Second, none of defendants—either the Board or its individual members—can assert governmental immunity against the claims for mandamus or injunctive relief, or against the claims for costs and attorneys' fees, because section 551.142(a)–(b) of the Texas Government Code explicitly waives any possible immunity defense against those claims. Third, the defendants are correct to observe that Ms. Garcia may not seek declaratory relief against the *Board*, but there is nothing that prevents her from seeking declaratory relief against the *individual* trustees.

Finally, the defendants are wrong to assert that there is "no relief available" to Ms. Garcia. It is certainly *possible* for the district court to grant some or all of the relief that Ms. Garcia is demanding, and that is all that is needed to show that this case is not moot. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) ("A case becomes moot, however, 'only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" (*quoting Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012)). Any objections that the defendants might raise to the requested relief go to the merits; they have nothing to do with the district court's *jurisdiction* to consider this case.

Argument

I. The Plea To The Jurisdiction Is Moot Because Ms. Garcia Has Amended Her Petition And Specifically Asked For "Reversal" Of The Defendants' Vote To "Rescind" The Motion Of August 3, 2020

The defendants' appeal cannot get off the ground because Ms. Garcia has amended her petition in a manner that moots the defendants' jurisdictional objections. When a plaintiff amends her petition, the original petition no longer exists. *See, e.g.*, Tex. R. Civ. P. 65; *MBank Brenham, N.A. v. Barrera*, 721 S.W.2d 840, 842 (Tex. 1986) ("The original petition . . . was thus superceded by the amended petitions and no longer constituted a pleading in the case." (citation and internal quotation marks omitted)). So the defendants must direct their jurisdictional objections to the *amended* petition, not the original petition. And the amended petition alleges that the defendants' purported "repeal" of their motion from August 3, 2020, violated the Texas Open Meetings Act and has no legal effect. CR 646–647 (alleging that the defendants failed to provide sufficient public notice before their meeting of September 14, 2020).

Whether the defendants *actually* violated the Texas Open Meetings Act at their meeting of September 14, 2020, is irrelevant. *See Bland Independent School District v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000) ("A plea to the jurisdiction is a dilatory plea, the purpose of which is to defeat a cause of action without regard to whether the claims asserted have merit."); *Schmitz v. Den-*

ton County Cowboy Church, 550 S.W.3d 342, 351 (Tex. App.—Fort Worth 2018, pet. denied) ("A plea to the jurisdiction is a dilatory plea that is unconcerned with the merits of the asserted claims and that challenges the trial court's power to adjudicate a case."). Ms. Garcia has *alleged* a violation, and the district court surely has *jurisdiction to decide* whether the defendants' efforts to "rescind" their earlier motion complied with the Texas Open Meeting Act. So the defendants' plea to the jurisdiction is based on a premise that no longer exists: It assumes the validity of the Board's "repeal" at the meeting of September 14, 2020, and it uses that to assert that the district court lacks jurisdiction to award *any* of the relief that Ms. Garcia seeks. But the amended petition is now seeking to *reverse* the actions taken at the meeting of September 14, 2020,[4] and the district court undoubtedly has jurisdiction to consider Ms. Garcia's TOMA objections to the purported "repeal." So the plea to the jurisdiction is moot. Its jurisdictional objections are directed toward a pleading that no longer exists, and those jurisdictional objections have become irrelevant now that the amended pleading specifically challenges the validity of the rescinding actions.

II. The Defendants' Governmental-Immunity Argument Is Meritless

The defendants never even raised a governmental-immunity defense in the district court. CR 212–223 (original plea to the jurisdiction); CR 224–236

4. CR 646–647.

(first amended plea to the jurisdiction). That does not preclude them from raising governmental immunity for the first time on appeal. *See Manbeck v. Austin Independent School District*, 381 S.W.3d 528, 530 (Tex. 2012). But much of their argument for "governmental immunity" is a repackaged version of the arguments for *mootness* that they advanced in the district court. CR 228. It is hard for us understand why the defendants would choose to characterize their jurisdictional objections as arguments for "governmental immunity" for the first time on appeal. An argument for governmental immunity can help only the board of trustees; it does nothing to defeat the claims brought against the *individual* defendants, which fall squarely within the *ultra vires* doctrine and cannot be defeated by an appeal to governmental immunity. *See, e.g.*, *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 404 (Tex. 1997) ("A private litigant does not need legislative permission to sue the State for a state official's violations of state law. A state official's illegal or unauthorized actions are not acts of the State. Accordingly, an action to determine or protect a private party's rights against a state official who has acted without legal or statutory authority is not a suit against the State that sovereign immunity bars."); *Texas Parks & Wildlife Dep't v. Sawyer Trust*, 354 S.W.3d 384, 393 (Tex. 2011) ("[S]uits for declaratory or injunctive relief against a state official to compel compliance with statutory or constitutional provisions are not suits against the State.").

More importantly, the Texas Open Meetings Act explicitly waives the Board's governmental immunity, and the defendants cannot establish a governmental-immunity defense in the teeth of this statutory waiver. Section 551.142 provides:

> (a) An interested person, including a member of the news media, *may bring an action by mandamus or injunction* to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body.
>
> (b) The court *may assess costs of litigation and reasonable attorney fees* incurred by a plaintiff or defendant who substantially prevails in an action under Subsection (a). In exercising its discretion, the court shall consider whether the action was brought in good faith and whether the conduct of the governmental body had a reasonable basis in law.

Tex. Gov't Code § 551.142(a)–(b) (emphasis added). The Supreme Court of Texas has held that this establishes a "clear and unambiguous waiver" of governmental immunity for claims seeking injunctive or mandamus relief. *See Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 554 (Tex. 2019) ("The Open Meetings Act thus contains a clear and unambiguous waiver of immunity from suits seeking injunctive and mandamus relief."). The language of section 551.142(b) provides an equally "clear and unambiguous waiver" of governmental immunity over Ms. Garcia's demand for costs and attorneys' fees. Any effort to dismiss Ms. Garcia's petition on governmental-immunity grounds is a non-starter given the text of section 551.142 and the state supreme court's holding in *Swanson*.

The defendants correctly observe that section 551.142 does *not* waive the Board's immunity over claims seeking declaratory relief. *See Swanson*, 590 S.W.3d at 554 ("[T]he Open Meetings Act's clear and unambiguous waiver of immunity does not extend to suits for declaratory relief."); Appellants' Opening Br. at 11. And Ms. Garcia asked for declaratory relief in both her original and amended petitions. CR 27 (requesting a "declaration voiding all actions taken in violation of the Open Meetings Act"); CR 647 ("The Court should declare as void all actions taken in violation of the Open Meetings Act."). But Ms. Garcia can *still* obtain this declaratory remedy against the individual trustees, who have been sued for their *ultra vires* acts and cannot assert governmental immunity, even though she cannot obtain this declaratory relief against the Board. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 373 (Tex. 2009); *Town of Flower Mound v. Rembert Enterprises, Inc.*, 369 S.W.3d 465, 476 (Tex. App.—Fort Worth 2012, pet. denied) ("[D]eclaratory-judgment suits against state officials allegedly act[ing] without legal or statutory authority are permissible" (citation and internal quotation marks omitted)). There is no basis on which this Court can dismiss any portion of the petition (or amended petition) on governmental-immunity grounds.

The defendants also insist that the Court is incapable of granting the mandamus and injunctive relief and the costs and attorneys' fees that Ms. Garcia is requesting. *See* Appellants' Opening Br. at 12–13. But that is *not* an argument for governmental immunity. It is an argument for mootness or lack

of standing. The defendants recognized as much in the district court, where their plea to the jurisdiction argued that Ms. Garcia's claims had become *moot* because (in the defendants' view) the relief that Ms. Garcia demanded was no longer available. CR 224–236. We cannot understand why the defendants now believe that this can support a governmental-immunity argument when the relevant statute *waives* the Board's immunity for mandamus and injunctive relief, as well as costs and attorneys' fees. The waiver of immunity in section 551.142 does not depend on whether a plaintiff ultimately prevails on his claims for mandamus or injunctive relief, and it does not in any way depend on the strength on those claims. The statutory waiver applies to anyone who "brings" an action that seeks mandamus or injunction to stop, prevent or reverse a violation of the Texas Open Meetings Act. *See* Tex. Gov't Code § 551.142(a) ("An interested person, including a member of the news media, *may bring an action* by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body." (emphasis added)); *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 554 (Tex. 2019) ("The Open Meetings Act thus contains a clear and unambiguous waiver of immunity from suits *seeking* injunctive and mandamus relief." (emphasis added)). The defendants do not deny that Ms. Garcia is "seeking" injunctive and mandamus relief, and they do not deny that she has "brought an action" that seeks such relief. That is all that is needed to overcome governmental immunity in this case.

To summarize:

1. None of the individual trustees can assert governmental immunity against any of Ms. Garcia's claims because they have been sued for *ultra vires* acts;

2. None of the defendants can assert governmental immunity against the claims for mandamus or injunctive relief, or against the claims for costs and attorneys' fees, because section 551.142(a)–(b) explicitly waives any immunity defense regarding those claims; and

3. Ms. Garcia may not seek declaratory relief against the Board, but she may pursue declaratory relief against the individual trustees.

III. The Defendants' Claim That There Is "No Relief Available" Is Meritless

The defendants renew the argument that they made in the district court: That there is "no relief available" to Ms. Garcia because they supposedly "rescinded" the motion of August 3, 2020, and filed an interpleader offering to pay $10,700 in attorneys' fees. *See* Appellants' Br. at 13–15. The defendants' claim is meritless—regardless of whether the Court regards this as an argument for "mootness" or an argument for governmental immunity.

First, the defendants have *not* rescinded the actions that Ms. Garcia is seeking to reverse by writ of mandamus. The transcript from the meeting of September 14, 2020, makes clear that the vote to "rescind" the motion of August 3, 2020, will *not* undo the board's decision to "receive" the Cultural Competence Action Plan, nor will it undo the board's decision to "direct"

the superintendent to hold workshops to solicit community input on the Plan. *See supra* at 4–7. Those are the very actions that Ms. Garcia is seeking to "reverse" in this lawsuit,[5] and it remains possible for this Court to grant that relief even after the board's vote to "rescind" the *motion* of August 3, 2020. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) ("A case becomes moot . . . only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (citation and internal quotation marks omitted)); *Allstate Insurance Co. v. Hallman*, 159 S.W.3d 640, 642–43 (Tex. 2005) ("A case becomes moot if a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome.").

Ms. Garcia is suing to reverse the Board's actions in *receiving* the Cultural Competence Action Plan and in *directing* the administration to hold workshops on that Plan, which she alleges was done in violation of the Texas Open Meeting Act. The defendants have not reversed either of those actions. On the contrary, the defendants stand behind each of those actions and insist that they did not even need to hold a public vote on those decisions.[6] The

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5. *See* Tex. Gov't Code § 551.142(a) ("An interested person, including a member of the news media, may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation of this chapter by members of a governmental body.").
6. *See* Defs.' First Amended Plea to the Jurisdiction at ¶ 9 (CR 227) ("At the August 3, 2020 Board meeting, the CISD Board moved 'to receive the plan and direct the administration to hold a series of workshops for clarity on the [CCAP].' (See Pl. Pet., Exhibit 4, p.7 (regarding Agenda Item #5.A)). Plaintiff cites to no authority, and there is none, that would

district court remains capable of reversing those actions through an injunction or writ of mandamus, and that is all that is needed to show that this case is not moot. *See Campbell-Ewald*, 577 U.S. at 161 ("A case becomes moot . . . only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (citation and internal quotation marks omitted)).

Second, Ms. Garcia is challenging the validity of the purported "repeal" in her first amended petition, which alleges that the meeting of September 14, 2020, was held in violation of the Texas Open Meetings Act. *See supra* at 13–14; CR 646–647. She is also asking the district court to reverse the vote that was taken on September 14, 2020, to "rescind" the motion of August 3, 2020. CR 647–648. The defendants ignore this because their plea to the jurisdiction—and the appellate brief that they have filed in this Court—remain fixated on Ms. Garcia's *original* petition, which was superseded before the defendants took their appeal. CR 625–650. But the defendants must confront the claims in the *amended* petition, which moots any jurisdictional objections that are based on the defendants' actions at the meeting of September 14, 2020.

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have required procedural action for the Board to receive the information or for the administration to continue to work on the CCAP; however, the Board mistakenly took action to receive the plan and encourage [the] administration to continue its work."); *id.* at 11 (CR 228) ("[T]he Board did not have to take any action at the August 3, 2020 Board meeting in order to receive the report and allow administration to continue developing the CCAP").

Third, Ms. Garcia is seeking relief beyond the mere reversal of the actions taken on August 3, 2020. She is also seeking an injunction to prevent the defendants from violating the Texas Open Meetings Act in the future, a return of funds spent on meetings that violated the Texas Open Meetings Act, and a recovery of costs and attorneys' fees. CR 647–648. The district court unquestionably has jurisdiction to consider this requested relief—regardless of whether Ms. Garcia is ultimately entitled to it.

The Texas Open Meetings Act allows Ms. Garcia to "bring an action by mandamus or injunction to stop, *prevent*, or reverse a violation or threatened violation of this chapter by members of a governmental body." Tex. Gov't Code § 551.142(a) (emphasis added). Ms. Garcia is asking this Court to "prevent" future violations of the Texas Open Meetings Act by enjoining the defendants from engaging in covert deliberations by text message and by subjecting their future electronic communications concerning the Cultural Competence Action Plan to judicial oversight. CR 648. The Court surely has jurisdiction to consider this request under section 551.142(a), and the defendants present no argument to the contrary. Their entire analysis of this issue consists of three conclusory sentences:

> Garcia's request for the court to issue an "obey-the-law" injunction lacks merit. Any injunction to "obey-the-law" is redundant of obligations on the District. Garcia has not indicated that there is any authority to support such an injunction.

Appellants' Opening Br. at 15. How does this show that the Court lacks *jurisdiction* to consider Ms. Garcia's request for injunctive relief? Every injunction is a command to "obey the law"—one cannot seek an injunction that does not compel compliance with a legal obligation—so it is not clear what the defendants are hoping to accomplish by objecting to an "obey-the-law" injunction. And Ms. Garcia is not seeking an unadorned "obey-the-law" injunction; she is seeking specific injunctive relief that subjects the defendants' future electronic communications about the Cultural Competence Action Plan to judicial oversight in an effort to *prevent* violations of the Open Meetings Act:

> The Court should impose all temporary and permanent injunctive relief permitted by the Texas Open Meetings Act to reverse (or undo), stop, and/or prevent any actions taken and being taken to implement the actions taken by the Board in violation of the Texas Open Meetings Act. As set forth in her Motion for Temporary Restraining Order, Ms. Garcia will suffer irreparable injury that cannot be compensated in damages, or any damage suffered by her cannot be measured by any pecuniary standard. Thus, Ms. Garcia requests the Court to impose a temporary injunction that, inter alia, enjoins Defendant Carroll Independent School District Board of Trustees, including any of its committees (including the District Diversity Council), from taking any further action to advance and/or implement the Plan. The Court *should also order all electronic communications between* Ms. Moore, Ms. Mills, Mr. Gilpin, Mr. Almand, and/or Mr. Carlton concerning Board business, relating or pertaining (either directly or indirectly) to the Plan *to be overseen by the Court and/or Ms. Garcia during the pendency of this case.*

CR 648 (emphasis added). The defendants have demonstrated their willingness to flout the requirements of the Texas Open Meetings Act by deliberating over text message in violation of section 551.143; an injunction in response to these demonstrated violations is entirely appropriate. And in all events, any objections that the defendants might have to the propriety of an injunction goes to merits; it has nothing to do with a court's *jurisdiction* to consider Ms. Garcia's request.

Ms. Garcia is also seeking a return of funds spent in meetings that violated the Texas Open Records Act. CR 648. The district court has jurisdiction to consider this request under section 551.142(a), which authorizes suits to "reverse" a violation of the Texas Open Meetings Act — and "reversal" entails a repayment of public funds spent in any meeting that violated the statute. The defendants do not explain why the "reversal" remedy in section 551.142(a) should prevent the district court from ordering repayment of improperly expended public funds, especially when a "reversal" is supposed to undo the effects of an illegal act. The defendants also complain that "there is no specific way to quantify what the 'cost' for that portion of the August 3, 2020 meeting would be." Appellants' Opening Br. at 14. But that is an issue to be resolved in discovery; an anticipated evidentiary objection is no basis on which to sustain a plea to the jurisdiction.

Finally, Ms. Garcia's demand for costs and attorneys' fees prevents this case from becoming moot, even if the defendants could somehow show that

their actions have mooted Ms. Garcia's remaining requests for relief. *See Allstate Insurance Co. v. Hallman*, 159 S.W.3d 640, 642–43 (Tex. 2005); *Glassdoor, Inc. v. Andra Group, LP*, 575 S.W.3d 523, 530–31 (Tex. 2019). The defendants think that their Petition for Interpleader moots the demand for costs and fees, but it does no such thing. The defendants failed to provide any evidence to establish Ms. Garcia's *current* costs and attorneys' fees, and the interpleader alleges only that the $10,700.00 amount reflects the fees incurred as of September 22, 2020. CR 247 ("Garcia's attorneys have shared their attorneys' fees as of September 22, 2020, which totaled $10,700."). So even if defendants were to place $10,700.00 into the Court's registry, it would not "moot" the case (or Ms. Garcia's claim for attorneys' fees) because the defendants failed to show that it would be impossible for the district court to award *additional* fees and costs. *See Campbell-Ewald*, 577 U.S. at 161 ("A case becomes moot . . . only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." (citation and internal quotation marks omitted)). In addition, the district court has never even ruled on the defendants' interpleader, and the defendants asked the district court *not* to take up the interpleader after its denial of their plea to the jurisdiction:

> THE COURT: . . . [D]o you wish to then put off the hearing on the interpleader?

> MS. WALKER: Yes. We won't go forward on the interpleader today.
>
> THE COURT: Okay. We'll pass the hearing on interpleader in light of my ruling denying the Plea to the Jurisdiction.

RR 44. So it would be premature for this Court to weigh in on the interpleader when the district court has not ruled on it—and when the defendants specifically asked the district court *not* to take up the issue.

Conclusion

The district court's order denying the plea to the jurisdiction should be affirmed.

Respectfully submitted.

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This brief contains 6,286 words, excluding the portions exempted by Tex. R. App. P. 9.4(i)(1), according to Microsoft Word for Mac version 16.45.

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Dated: January 27, 2021